TIAN YAN ONN DEVELOPMENT SDN. BHD.

v.

NATIONAL HOLDINGS LTD. & ORS.

HIGH COURT MALAYA, MUAR
EUSOFF CHIN J
[CIVIL SUIT NO. 166 OF 1983]
18 SEPTEMBER 1986

CIVIL PROCEDURE: *Judgment by default - Plaintiffs' claim for costs of infrastructure works done on housing development project and arrears of quit rents and penalties for late payments - Appearance filed but no defence - Judgment served on defendant's solicitors - Delay in applying to set aside default judgment - Delay of 7 months 12 days - Whether any good and satisfactory explanation given for delay - Application to set aside judgment - Must be made promptly albeit no time limit fixed Whether defendant's affidavit discloses defence on merits or raises any triable issue - Non-disclosure of material facts - Whether amount claimed is liquidated damages or fixed sum.*

This was an application by the three defendants to set aside the judgment by default of appearance entered against them. The plaintiff's claim against the three defendants was for a sum of RM1,114,361.85 under two agreements which they had entered into with the defendants for costs of infrastructure works done on a housing development project. The plaintiffs also claimed a further sum of RM23,497.80 from the 1st and 2nd defendants being the amount as arrears of quit rents and penalties for late payments:

Held:

[1] There were no good and satisfactory explanations given by the 2nd defendants or their solicitors why they had taken almost seven months to file their application to set aside the default judgment. The application to set aside a default judgment must be made promptly although no time limit has been fixed. What is reasonable time within which such an application has to be filed depends on the circumstances of each case.

[2] In this case, the Court found that it was totally unreasonable and inexcusable for the defendants to wait for such a long time to file their application to set aside the default judgment and that too after the plaintiffs had obtained the garnishee order against their money at the bank. If the 2nd defendants are praying for the discretion of the Court to be exercised in their favour, the very least that they should demonstrate is some display of good faith.

[3] The Court found the 2nd defendant's conduct was consistent with being utterly negligent or else blatantly indifferent. Therefore if the Court lends its hands in aid of the 2nd defendants now, it would be at the expense and prejudice of the plaintiffs who had taken great pains to do what needs to be done and who were not found to be at fault.

[4] The non-disclosure of the agreement dated 14 July 1976 entered into between the 1st and 2nd defendants and exhibited to the affidavit for the plaintiffs which revealed that in fact the 2nd defendants were principals and not agents of 1st defendants as claimed by the 2nd defendants was wilful concealment of facts, and was fatal to their application to set aside the default judgment.

[5] The 2nd defendants' claim that they were agents of the 1st defendants, which was the main issue raised by the 2nd defendants that they had good defence was therefore dispelled by that agreement. Therefore the Court found no facts in the defendant's affidavits which would disclose a defence on the merits or raising any triable issue.

[6] The default judgments against both the 2nd and 3rd defendants had been regularly obtained by the plaintiffs. Therefore the 2nd and 3rd defendants' applications to set aside the default judgments were dismissed.

[Application to set aside Judgment by default dismissed with costs. Plaintiffs' application to set aside order to stay execution of Garnishee Order allowed.]

Cases referred to:
Ching Yuen Tung v. BEP Akitek [1978] 1 MLJ 211
Bank Bumiputra Malaysia Bhd. v. Majlis Amanah Rakyat [1979] 1 MLJ 23 FC
Runnacles v. Mesquita [1876] 1 QBD 416

JUDGMENT

Eusoff Chin J:

The plaintiffs' claim against the three defendants is for a sum of RM1,114,361.85 under two agreements they had entered with the defendants for costs of infrastructure works done on a housing development project. They claimed a further sum of RM23,497.80 from the 1st and 2nd defendants as the amount the plaintiffs had to pay to the Land Office as arrears of quit rents and the penalties for late payments. This also arose out of the same agreements dated 17 October 1978 and 26 October 1978 which were exhibited to the affidavit of the plaintiffs affirmed on 23 June 1984.

The plaintiffs filed their writ of summons on 16 June 1983 and specially indorsed the amounts claimed on the writ.

On 29 June 1983, the writ was served on the 2nd defendants.

On 5 July 1983, the 2nd defendants entered an appearance through their solicitors M/s. Tahir and Salleh.

No defence was filed by the 2nd defendants.

On 29 September 1983, the plaintiffs' solicitors gave 48 hours' notice to the 2nd defendants' solicitors to file a defence for the 2nd defendants failing which judgment by default of defence would be entered against the 2nd defendants. Two weeks later on 13 October 1983, no defence having been filed by the 2nd defendants, the plaintiffs obtained a judgment by default of defence against the 2nd defendants. This judgment had been regularly obtained by the plaintiffs.

On 21 October 1983 the judgment was served on the solicitors for the 2nd defendants.

On 2 November 1983 M/s. Shearn Delamore filed a notice of change of solicitors for the 2nd defendants.

On 5 November 1983 M/s. Shearn Delamore wrote to the solicitors of the plaintiffs to the effect that they were going to apply to the Court to set aside the judgment by default and requested the plaintiffs' solicitors to stay all execution proceedings for one week as per their letter of request, at "Exhibit TY03" to the affidavit of the plaintiffs affirmed on 23 June 1984.

Almost 4 months later, the 2nd defendants still did not file an application to set aside the judgment by default, and on 28 February 1984 the plaintiffs filed a Garnishee Summons against the 2nd defendants to garnish the 2nd defendants' money in the Overseas Chinese Banking Corporation at Muar.

On 23 May 1985 the Senior Assistant Registrar heard the application and issued a garnishee order.

On 23 May 1984 itself (i.e., 7 months and 12 days from the date of the default judgment, and almost 7 months after the solicitors for the 2nd defendants had informed the plaintiffs' solicitors that they would file an application to set aside the judgment) the 2nd defendants finally filed an application to set aside the judgment by default.

On 26 May 1984 the 2nd defendants' solicitors filed an application to stay the execution of the garnishee order and was granted by the Court.

On 24 June 1984, the plaintiffs filed an application to set aside the Court's order to stay the execution of the garnishee order.

As regards the 3rd defendant, he was the guarantor to the 2nd defendants. The writ of summons was served on him on 25 August 1983. He entered no appearance.

On 24 September 1983 judgment in default of appearance was obtained against him by the plaintiffs.

On 4 July 1983, a prohibitory order against certain properties of the 3rd defendant was obtained by the plaintiffs.

The order was served on the 3rd defendant on 25 July 1983.

On 8 December 1983 the 3rd defendant filed an application to set aside the judgment in default of appearance.

The 3 applications were heard and disposed of on 13 May 1986.

Delay in filing application to set aside judgment by default

Mr. Wilfred Abraham was the 2nd defendants' learned solicitor handling this case. He affirmed an affidavit on 22 May 1984 to say that he was not aware of the judgment in default of defence obtained against the 2nd defendants because the previous solicitors for the 2nd defendants did not forward to him the copy of the judgment by default of defence. Because of this he did not file the application to set aside the default judgment earlier. This is contrary to what the 3rd defendant had to say in his affidavit. The 3rd defendant, as a director of the 2nd defendants, affirmed an affidavit on 30 January 1985 explaining the delay in filing the application to set aside the default judgment. He said he only came to know of the default judgment against the 2nd defendants on 2 November 1983. This default judgment was served on the solicitors for the 2nd defendants on 21 October 1983. It could be that the solicitors took 10 days to inform the 2nd defendants of the default judgment. But on 2 November 1983 itself the 2nd defendants had engaged the firm of Shearn Delamore to be their solicitors, and the new solicitors had 3 days later i.e., on 5 November 1983 written to the plaintiffs' solicitors to stay execution of the judgment for one week to enable them to file an application to set aside the default judgment. Mr. Wilfred Abraham therefore must have known of this default judgment at the latest on 5 November 1983 when that letter was written by Shearn Delamore and Co. to the plaintiffs' solicitors requesting postponement of execution of the judgment.

No good and satisfactory explanations were given by the 2nd defendants or their solicitors why they had taken almost seven months to file their application to set aside the default judgment. Because the 2nd defendants and their solicitors had dragged their feet the plaintiffs were given the impression that the 2nd defendants were not exercising their right in pursuing their action to set aside the judgment by default and consequently the plaintiffs applied for and obtained the garnishee order on 23 May 1984. The obtaining of the garnishee order prompted the 2nd defendants to open their eyes to see what was going on, and no doubt prompted them to finally file their application to set aside the default judgment against them on that very day itself, i.e., on 23 May 1984. The application to set aside a default judgment must be made promptly although no time limit is fixed. What is reasonable time within which such an application is to be filed depends on the circumstances of each case. Bur for this case, I find that it was totally unreasonable and inexcusable for the defendants to wait for such a long time to file their application to set aside the default judgment, and that too, after the plaintiffs had obtained the garnishee order against their money at the bank. If the 2nd defendants are praying for the discretion of the Court to be exercised in their favour of the very least that they should demonstrate is some display of good faith. I find the 2nd defendants' conduct was consistent with being utterly negligent or else blatantly indifferent. If the Court lends its hands in aid of the 2nd defendants now, it would be at the expense and prejudice of the plaintiffs who had taken great pains to do what needs to done and who are not found to be at fault. As a result of this application to set aside the default judgment, the Court had stayed execution of the garnishee order pending the disposal of the 2nd defendant's application to set aside.

Non-disclosure of material facts

The learned solicitor for the 2nd defendants affirmed an affidavit on 22 May 1984 to which he had exhibited an agreement between the 1st defendants and the plaintiffs (Exhibit WA3 to the affidavit). This agreement was for sale of lands. The vendors were the 1st defendants. The 2nd defendants were cited as agents for the vendors, and the plaintiffs were the purchasers. The 3rd defendant signed personally as the guarantor for the 1st and 2nd defendants. The 3rd defendant as a director of the 2nd defendants, signed the agreement for the 2nd defendants, and as the 2nd defendants were stated as agent of the 1st defendants, the 3rd defendant also signed the agreement for the 1st defendants. This agreement also said that the vendors were responsible for the infrastructure works i.e., of constructing the drains, culverts, roads, etc. to serve the lands sold to the plaintiffs.

Therefore, the 2nd defendants contended that if the infrastructure works were not carried out by the vendors, and that consequently under the terms of the agreement, the plaintiffs had to do these infrastructure works, the plaintiffs should make their claim only against the 1st defendant, a company registered in Hong Kong. The 2nd defendants said they were only agent of 1st defendants for sale of the land, i.e., to sell and collect the money for 1st defendants. But both the 2nd defendant's solicitor and the 3rd defendant as director of the 2nd defendants, had failed to disclose in their affidavits the existence of another agreement entered into between the 1st defendants and the 2nd defendants on 14 July 1976, and exhibited as 'Exhibit Q' to the affidavit of Tian Yan Onn for the plaintiffs.

This agreement ('Exhibit Q',) revealed that in fact the 2nd defendants, in respect of the sale of the lands to the plaintiffs, were principals and not agents of 1st defendants as the 2nd defendants had claimed to be. By clouse 4 of this agreement ('Exhibit Q') the 1st defendants had given the 2nd defendants the rights to sell the lands to anyone at any price provided

that 2nd defendants must pay to the 1st defendants a certain fixed price per square foot of the land. Clause 3 of that same agreement ('Exhibit Q') also stipulated that the 2nd defendants had to construct the infrastructure works at a fixed contract price.

The 2nd defendants' Counsel urged me to ignore this agreement dated 14 July 1976, as it did not concern the plaintiffs. I do not agree since that agreement is very relevant to the case should the case go for trial.

I find that the non-disclosure of this agreement by the 2nd defendants was wilful concealment of facts, and was fatal to their application to set aside the default judgment.

The claim of the 2nd defendant that they were agents of the 1st defendants, which is the main issue raised by the 2nd defendants that they had a good defence, is therefore dispelled by that agreement ('Exhibit Q') dated 14 July 1976, *Ching Yuen Tung v. BEP Akitek* [1978] 1 MLJ 211. I can therefore find no facts in the defendants' affidavit which would disclose a defence on the merits, or raising any triable issue - *Bank Bumiputra Malaysia Bhd. v. Majlis Amanah Rakyat* [1979] 1 MLJ 23 FC.

Whether amount claimed is liquidated damages

The other issue raised by the defendants is that the amount claimed was not a liquidated sum. The affidavit affirmed by the plaintiffs on 4 December 1984 revealed that since the three defendants had failed to construct the roads, drains, culverts and water pipes (infrastructure works) in spite of various letters written by the plaintiffs to them, the plaintiffs under the terms of the agreements dated 17 October 1978 and 16 October 1978 engaged Syarikat Pembinaan Bandar to complete those works at a total cost of RM1,114,361.85 under the terms of a fixed price contract signed between the plaintiffs and that Syarikat Pembinaan Bandar on 10 January 1982. There was also the quit rents which the 2nd defendants, under the contract signed between them and the 1st defendants dated 14 July 1976, had to pay and which the 2nd defendants did not pay, and were finally paid by the plaintiffs, amounting to RM23,497.80. The various letters written by the plaintiffs' solicitors to the defendants' solicitors demanding payments of these sums of money were ignored and the assumption is that they did not want to dispute the reasonableness of the plaintiffs' claim - *Runnacles v. Mesquita* [1876] 1 QBD 416.

The defendants in their various affidavits, did not specifically dispute the amounts claimed by the plaintiffs although the plaintiffs' Writ of Summons was specially indorsed with a claim for a specific sum of money - i.e., RM1,114,361,85 as against both the 2nd and 3rd defendants, and a further sum for RM23,497.80 as against the 2nd defendants. For that reason I would treat the amounts claimed by the plaintiffs as liquidated damages so that when I subsequently dismissed the application of the 2nd defendants to set aside the default judgment, I did not vary the Senior Assistant Registrar's order to one of "judgment by default of defence with damages to be assessed."

The 3rd defendant's ground in supporting his application to set aside the default judgment was that he was not liable as a guarantor of the 2nd defendants unless the 2nd defendants were found liable to the plaintiffs to pay the amounts claimed.

The default judgments against both the 2nd and the 3rd defendants had been regularly obtained by the plaintiffs. I have found no facts disclosing any defence or raising a triable issue, and further that the long delay by the 2nd defendants in making this application had caused prejudice to the plaintiffs. I therefore dismissed the 2nd and the 3rd defendant's applications to set aside the default judgments.

As regards the application of the plaintiffs to set aside the order dated 26 May 1984 to stay the execution of the garnishee order, that order of stay was to operate pending the hearing and decision of the Court on the application to set aside the default judgments by the 2nd defendants.

Since I have dismissed the 2nd applications to set aside the default judgments made by the 2nd and 3rd defendants, I then allowed the plaintiffs' application to set aside the order dated 26 May 1984.

I ordered the 2nd and 3rd defendants to pay costs of these applications.

Also found at [1988] 1 CLJ 372